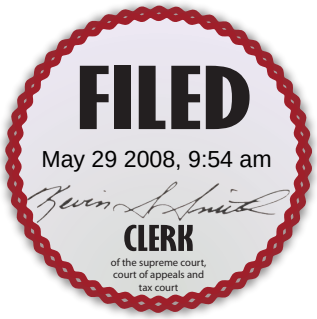

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IN THE
COURT OF APPEALS OF INDIANA

JOHN HOLLINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0704-CR-237
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49GO2-0509-FA-160480

May 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

John Hollins appeals his convictions on three counts of rape and one count of criminal deviate conduct, all as class A felonies, and on one count of criminal confinement, as a class B felony, and his adjudication as an habitual offender; as well as his sentence.

We affirm.

ISSUES

1. Whether the trial court erred when it denied Hollins' motion to sever trial of the charged offenses.

2. Whether the sentence imposed is inappropriate.

FACTS

On August 28, 2002, B.F. worked at P.T.'s, a club near Pendleton Pike in Indianapolis. After finishing work late that evening, she started to walk home. Near the intersection of 10th and Gray Streets, a car driven by a man B.F. recognized as a patron of P.T.'s pulled over. The man offered her a ride, and she accepted. Although she was not far from her destination, the man drove a route that took her farther away. B.F. asked him to pull over and let her out, but he refused and continued to drive. The man pulled the car behind an old building located at 2440 Lafayette Road and parked.

B.F. testified that the man then moved her seat into the reclined position, held a box cutter to the side of her neck, "said if you cooperate, you'll live," and "made her take off" off her pants, underwear, and shoes. (Tr. 59). B.F. testified that he "made [her] put her feet on the dashboard" and, while holding the box cutter against her neck, "raped

[her]" by putting his penis in her vagina. (Tr. 60, 61). When he finished, he told her to get out of the car, then threw her clothes out, and backed the car around the building. B.F. reported the incident to the police. She was taken to the hospital, where a sexual assault examination was conducted and evidence collected.

On the morning of April 8, 2003, J.R. was waiting at a bus stop across from the juvenile center located at 25th Street and Keystone Avenue. A car pulled up to the bus stop, and the driver asked her if she needed a ride. J.R. said no. The man pulled his car into the gas station near the bus stop and shouted something to her. J.R. walked to the car, and the man opened the passenger-side door. She saw him holding something with "a brown handle down by his leg" and "froze." (Tr. 112). The man "slid" over, grabbed her hand, and "told [her] don't scream, don't run, just get in." (Tr. 113). J.R. got in, and he drove the car a short distance and then pulled over. J.R. testified that he then "told [her] to close [her] eyes and he laid the seat back and he put [a] knife up to [her] throat." (Tr. 114). J.R. further testified that he "told [her] not to say anything or he would stab [her] and cut [her]." (Tr. 115). The man then resumed driving, continuing to hold the knife to J.R.'s throat. The man stopped the car behind the building located at 2440 Lafayette Road.

J.R. testified that the man then "told [her] . . . to take off [her] pants," moving the knife against her throat and threatening to "stab and cut" her if she did not comply. (Tr. 116). J.R. "started to take off" her pants, but then he "leaned over and pulled [her] shoes off and pulled [her] pants" and underwear off. (Tr. 117). J.R. testified that the man then unzipped his pants and ordered her to "give [him] oral," again threatening to "stab and

cut [her]" before he "put his penis in [her] mouth." (Tr. 118). J.R. further testified that the man "then . . . moved down in between [her] legs and put [her] legs up" on the dashboard and "put his penis up inside [her] vagina." (Tr. 119). After finishing, the man threw her clothes out of the car, told her to get out and walk around to the front of the car, and backed the car around the building. J.R. reported the incident to the police, and she underwent a sexual assault examination and evidence was collected at the hospital.

On the morning of February 6, 2004, Rudolfo Prieto agreed to drive D.S. to a house near 16th and Concord Streets for her to make a drug purchase. On the way, D.S. and Prieto argued. After arriving at the house, D.S. went to the door and began knocking; Prieto drove away. When no one answered, D.S. started to walk home. Near the intersection of 10th and Concord Streets, a car pulled over to the side of the street and offered D.S. a ride; she accepted and got in the car. D.S. asked the man some questions and concluded that he was not a police officer; she then told him that she was looking for some drugs and needed money. D.S. agreed to perform "some kind of sexual favor" for $20.00. (Tr. 260). He then drove to the back of the building located at 2440 Lafayette Road.

D.S. testified that he then "pulled out [a] box cutter" and held it to the side of her throat. (Tr. 245). D.S. further testified that the man told her to take off her pants, underwear, and shoes, while pressing "the knife a little deeper." (Tr. 246). D.S. complied; and he "reached over " and "pulled the lever" to recline the passenger seat, and then "crawled on top of [her]." (Tr. 247, 246). D.S. testified that he put his penis in her vagina, while continuing to hold the box cutter to her throat "the whole time." (Tr. 249).

D.S. further testified that during the rape, the man accidentally hit a switch that lowered the rear passenger-side window. When he had finished raping her, he told her to get out and walk around to the front of the car; he then threw her clothes out and backed the car around the building.

D.S. put her clothes on and ran to a nearby business to call the police. Detective Hewitt, a sex crimes investigator with the Indianapolis Metropolitan Police Department, was dispatched and interviewed D.S. D.S. provided a good description of the rapist's car, and Hewitt drove her through the neighborhood near 2440 Lafayette Road. In the driveway of a home several blocks from the crime scene, they saw a car matching the description – with its passenger seat in the reclined position and its rear passenger-side window lowered. D.S. advised Hewitt that she was positive this was the car in which she had been raped. Hewitt then took D.S. to the hospital, where she underwent a sexual assault examination and evidence was collected.

On September 21, 2005, the State filed six criminal charges against Hollins. Count I alleged rape, as a class A felony, of B.F. in August of 2002. Count II alleged rape, as a class A felony; Count III alleged criminal deviate conduct, as a class A felony; and Count VI alleged committed criminal confinement, as a class B felony; all as to J.R. on April 8, 2003. Count IV alleged rape, as a class A felony, of D.S. The sixth charge (Count V) alleged his rape of a fourth woman, L.B., during the month of December 2003. In addition, the State filed an information alleging that Hollins was an habitual offender.

On October 30, 2006, Hollins filed a motion "requesting that the court . . . sever the offenses alleged against the defendant and set separate trial for each charge that has a

separate victim." (App. 128). The trial court held a hearing on November 8, 2006, wherein Hollins argued that the charges were joined only for "common similarities" of "someone who goes and picks up a prostitute" but "not unique to someone who's a serial rapist." (Tr. 526). The State argued that the facts established a pattern of the rapist, establishing a "signature crime." (Tr. 531). The trial court agreed to sever the charge as to the alleged rape of L.B., noting the lack of DNA and her delayed reporting of the crime. However, it denied severance of the other charges, finding the alleged offenses were "signature crimes." (Tr. 534). It noted as follows:

> The defendant[1] held either a knife or box cutter to each of the victims' throats and in each of them after removing the (indiscernible) and vaginally raping them, not using a condom, he threw all their clothes out into the street and then drove away.

(Tr. 534).

A jury trial was held on March 12-13, 2007. B.F., J.R., and D.S. testified; each identified Hollins as the man who had raped her. Each testified that the criminal acts took place without her consent and while Hollins held a blade to her neck. In addition, forensic analysis reports established that evidence collected from B.F., J.R., and D.S. after the sexual assault examinations contained DNA matching Hollins' DNA profile. Hollins testified that although he had had sex with each of the women, it was consensual sex, and without his holding a box cutter or a knife on the woman's neck. The jury convicted Hollins of three counts of rape and one count of criminal deviate conduct, as class A felonies, and one count of criminal confinement, as a class B felony. Thereafter,

[1] Hollins' counsel had asserted at the hearing that "[t]hey have DNA," such that "identity isn't an issue," and "the only issue here is whether" the women had consented to having sex with Hollins. (Tr. 526).

Hollins waived jury trial on the habitual offender allegation and admitted to the trial court that he was an habitual offender.

On March 28, 2007, the trial court conducted the sentencing hearing. Hollins affirmed to the trial court that his pre-sentence investigation report was accurate. The report reflected Hollins' account of having suffered significant personal losses in the death of his invalid twelve-year-old son in 1994 and the death of his father in 1998, as well as Hollins' criminal history. In announcing sentence, the trial court stated the following:

> As to mitigating circumstances, I considered the fact that he lost his father and he lost his child. I'll find that as a mitigator. However, I'm not going to give that great weight, primarily because I certainly don't -- while it's sad and no one likes to suffer the loss of a child. Nevertheless, it doesn't excuse his conduct in this situation. So I'll find that as a mitigator, but I'll give that very little weight. As to the Habitual Offender, I am going to find that he accepted responsibility for that and will add that as a mitigator solely as it relates to the Habitual Offender, and I've taken that into account as I've drafted my sentence here as well. As to aggravating circumstances, this court does believe his criminal history is aggravating, '88 Driving While License Suspended, '89, Burglary as a C felony, '89, Handgun as a C. In 2004, Battery as a C. Which, I note, was originally an attempted rape. Anyway, I believe his criminal history is aggravating. I also have carefully weighed that aggravator against the mitigating circumstance acknowledged here today, and I believe that the aggravator far outweighs that mitigation in this case.

(Tr. 511-12). As to B.F., the trial court ordered Hollins to serve thirty years on Count I, rape as a class A felony. As to J.R., it ordered him to serve thirty years on Count II, rape as a class A felony, and twenty years on Count III, criminal deviate conduct as a class A felony. The sentences for Count II and Count III were to be served concurrent with each other but consecutive to Count I. As to D.S., the trial court ordered Hollins to serve thirty

years for rape as a class A felony, said sentence to be served consecutive to Count II. On Count VI, criminal confinement (of J.R.) as a class B felony, it ordered him to serve ten years, consecutive to Count IV. The trial court then imposed a ten-year habitual offender enhancement on "the Confinement as a B felony." (Tr. 513). Thus, the total sentence imposed by the trial court is 110 years.

DECISION

1. Denial of Motion to Sever

Hollins first argues that he "is entitled to the severance he requested as a matter of right" because the "charges against him were joined solely on the grounds they were of the same or similar character." Hollins' Br. at 6. We cannot agree.

Indiana law provides as follows:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting part of a single scheme or plan.

Ind. Code § 35-34-1-9(a). As to a severance of charged offenses,

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses.

I.C. § 35-34-1-11(a) (emphasis added). However, when the offenses have not been joined for trial "solely on the ground that they are of the same or similar character," the statute directs the trial court to grant a severance

> whenever [it] determines that severance to promote a fair determination of the defendant's guilt or innocence considering:
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) Whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Id. Our Supreme Court has held that "[o]ffenses may be sufficiently 'connected together' to justify joinder under subsection 9(a)(2) 'if the State can establish that a common *modus operandi* linked the crimes and that the same motive induced that criminal behavior.'" *Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000) (quoting *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997), *cert. denied*).

We have defined *modus operandi* as "a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer.'" *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. 1999) (quoting *Goodman v. State*, 708 N.E.2d 901, 902 (Ind. Ct. app. 1999)). Here, the assaults on B.F., J.R., and D.S. had the same *modus operandi*. Each woman was on foot and alone when approached by Hollins in his car. Each was offered a ride and once inside his car, taken to the same location. Once there, in each instance Hollins reclined the passenger side seat, placed a bladed weapon against the throat of each woman, ordered each woman to remove her clothing below waist-level, and proceeded (without the use of a condom) to insert his penis in her vagina. After completing each act of rape, Hollins would order the woman out of the car and then proceeded to throw her clothes out and back his car away. We find that this pattern of conduct is "sufficient to establish that the molestation of each victim was the handiwork of the same person." *Craig*, 730 N.E.2d at 1265. Further, the motive of the sexual

offenses was the same – to satisfy Hollins' sexual desires. *Id.* Therefore, Hollins did not have a right as a matter of law "to a severance of the offenses." I.C. § 35-34-1-11(a).

Hollins further argues, "Even if severance was not mandatory, it was an abuse of discretion for the court to deny it because severance was 'appropriate to promote a fair determination of the defendant's guilt or innocence.'" Hollins' Br. at 12, citing I.C. § 35-34-1-11(a). In this regard, Hollins argues the "complexity of the evidence against him," particularly the DNA evidence, warranted separate trials. *Id.* We are not persuaded.

Hollins conceded to the trial court that the identity of the man who had sex on the dates in question with B.F., J.R., and D.S. was not at issue but rather whether they had consented to the sexual acts. Thus, the DNA evidence was not dispositive of the issue of his guilt. The trial court's ruling left Hollins facing a single trial on charges that he raped three women and committed both criminal deviate conduct and confinement upon one of them. Each of the women testified and their accounts of the alleged offenses were not complicated. Whether the women consented to the sexual acts or whether they complied because Hollins was holding a bladed weapon to their throats are matters of credibility, *i.e.*, matters for determination by a jury. Thus, we cannot agree that severance was necessary to promote a fair determination.

Further, in order to prevail on a claim that the trial court erred in denying his motion to sever, Hollins had to show that "in light of what actually occurred at trial, the denial of a separate trial subjected him to . . . prejudice." *Harvey*, 719 N.E.2d at 409 (quoting *Brown v. State*, 650 N.E.2d 304, 306 (Ind. 1995)). Hollins does not present any such showing. If he had been tried separately, the same DNA evidence would have

linked Hollins to each woman, and each woman would have testified to the same facts. Because the dispositive determination would still be credibility, based upon Hollins' defense of consent, we cannot find that Hollins was prejudiced by the denial of his motion to sever.

2. Sentence

Citing Indiana Appellate Rule 7(B), Hollins argues that his sentence is inappropriate in light of the nature of the offenses and his character. Specifically, he asserts that the circumstances surrounding the offenses "were not particularly egregious," and the women "were not injured beyond the harm inherent" in the charges, and reminds us that he has "a caring family" and suffered "grief over the loss of his son and father." Hollins' Br. at 13. We are not persuaded.

We have the authority to revise a sentence if, "after due consideration of the trial court's decision," it is found that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate rule 7(B). The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

For each of the class A rape offenses, the trial court imposed the advisory thirty-year sentence. *See*, I.C. § 35-50-2-4. For the criminal deviate conduct offense, also a class A felony, the trial court imposed the minimum twenty-year sentence. *Id.* For the offense of criminal confinement, as a class B offense, the trial court imposed the advisory ten-year sentence. *See* I.C. § 35-50-2-5. Finally, the trial court identified "the underlying offense" for the habitual offender enhancement as the criminal confinement, as a class B

offense, and imposed the minimum ten-year sentence in that regard. *See* I.C. § 35-50-2-8(h), and *Id.* Accordingly, we do not find any of these sentences to be inappropriate.

The trial court then ordered certain sentences to be served consecutively, with the result that the aggregate sentence is 110 years. In order to impose consecutive sentences, the trial court "must find at least one aggravating circumstance." *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000). The trial court found Hollins' criminal history to be an aggravating circumstance, and Hollins does not challenge that finding. It is true that the aggregate sentence imposed is a long sentence. However, the circumstances of Hollins' crimes are abhorrent; he inflicted pain on multiple victims; and he conceded a criminal history dating to his juvenile years. He has not persuaded us that the aggregate sentence imposed is inappropriate. *See Childress*, 848 N.E.2d at 1080.

Affirmed.

NAJAM, J., and BROWN, J., concur.